QBD Costs Appeal before the Honourable Mr Justice Openshaw (Sitting with Assessors) Master Campbell & John Bucklow Esq. 12th December 2005.

JUDGMENT : Mr Justice Openshaw

1. This is an appeal from rulings made in the course of a detailed assessment of costs by Master Seager Berry, sitting as a Costs Judge on 10th June this year, by which he struck out those parts of the Points of Dispute in which the defendants (the appellants before me), Pridie Brewster, sought to raise matters of professional negligence and conduct against the claimant solicitors, Nicholas Drukker and Co (`Drukkers'). The appeal is brought with the leave of the single judge.

2. It is necessary to say something of the factual background. In late 1997, Mr McGowan and Mr Chadwick between them bought a lease on the Lee Garden restaurant in Kensington High Street. They intended to run it in partnership: Mr Chadwick found the money and was to provide accountancy services; Mr McGowan was to manage the day to day business. Unfortunately, they fell out. In April 1999, Mr McGowan started proceedings against Mr Chadwick. On 23 April 1999, Neuberger J, on Mr McGowan's application, appointed Mr Grant as receiver;. Mr Grant is a partner with the defendants Pridie Brewster. On 14th May 1999, Mr Grant, the newly appointed receiver, appointed Mr Drukker, the principal of the claimant firm of solicitors, to act for him in the receivership. Issues arose as to the disposal of the business; Mr Grant had to balance his duty to get the best price against his anxiety to make a quick sale, so as to reduce the continuing loss in running the business. Mr Chadwick himself made an offer to buy the business back, which he urged Mr Grant to accept. There were many issues to sort out before the sale could go through. Eventually, after protracted negotiations, which involved Mr Drukker in a good deal of work, the business was indeed bought back by Mr Chadwick. Mr Chadwick was aggrieved at the delays in arranging the sale; he claimed that he had lost the opportunity to trade profitably as a result of professional negligence by the receiver Mr Grant. Mr Grant in turn alleged professional negligence against his solicitor Mr Drukker, blaming him for the delays.

3. The sale of the business to Mr Chadwick was completed on 26 June 2000. On 31 October 2000 Mr Drukker submitted his firm's bill in the sum of £86,089.94. By letter dated 4th December 2000, Squire & Co (solicitors acting on behalf of Pridie Brewster), requested a detailed assessment of Mr Drukker's bill of costs under provisions of the Solicitors Act. The preparation of a breakdown of the bill was a substantial matter; the draft breakdown was served on the 7th September 2001. A month later, on the 5th October, Drukkers issued Part 8 proceedings, seeking a detailed assessment of their costs.

4. Within three weeks of this request, (by letter dated 23 October 2001), Squire-& Co wrote to the Supreme Court Costs Office seeking a stay of the assessment procedures `***pending mediation***'. Another reason to suspend the assessment process was to await the result of the action for negligence brought by Mr Chadwick against Mr Grant. A stay was imposed at a hearing the next day, when it was made plain that one of the remedies being considered by Mr Grant was an action by Pridie Brewster claiming damages against Drukkers for professional negligence. However, it was not until 5th November 2003, fully two years later, that the defendants, pursuant to the pre-action protocol procedures implemented following the introduction of the Civil Procedure Rules, served draft Particulars of Claim on Drukkers, claiming damages for negligence and/or for breach of contract in the sum of £361,000. In due course, Drukkers served a detailed draft defence.

5. It is necessary to say something of the allegations being made; I set them out in summary form only to demonstrate their factual complexity. There were essentially four heads of claim, conveniently - but crudely - labelled `conduct', `assignment', `waiver' and `indemnity'.

6. I shall deal firstly with `conduct': it was said that the delay in selling the business was the fault of Drukkers, in dragging their feet as the restaurant continued to lose money. In response to this Drukkers say that, for some considerable time, Mr Grant thought that the business was making money. They contend that if blame should be attached for the delay it was entirely caused by Mr Grant and not by them.

7. I turn next to the `assignment' point: it was said against Drukkers that they had advised Mr Grant that he (Mr Grant) was not entitled to assign back to Mr Chadwick the debt arising from the loan originally

taken out by Mr Chadwick when he bought the business. It is said that Drukkers had advised that the purchase had to be paid in cash only; and that since Mr Chadwick could not raise the cash by reason of the outstanding loan, the matter came to an impasse. It was claimed that that this advice was wrong. The answer of Drukker's to this point was that the advice was not given in the terms alleged at all and they always advised that a sale could be paid by part assignment and part cash.

8. I move on to the `waiver' point. It was said that Drukkers gave erroneous advice on the extent to which Mr Grant could impose a condition on the sale of the business back to Mr Chadwick by which he (Mr Chadwick) waived any claim which he might have had against Mr Grant for misconduct during the receivership. It is said that protracted negotiations were needed to sort this matter out, which cost a great deal of time, effort and energy and further delayed the sale, incurring further costs and causing Mr Chadwick to be deprived of the opportunity of earning profits.

9. The final issue raised against Drukkers was the so-called `indemnity point'. Drukkers undoubtedly did do a good deal of work in trying to sort out the pre-receivership liabilities of the parties and the costs which Mr Grant had incurred in the course of his receivership. It was claimed that that Drukkers had failed to advise Mr Grant that he should have satisfied himself of the adequacy of the partnership assets to meet the liabilities and his costs before acting, or, alternatively, he should have sought an indemnity from the partners.

10. In due course, a detailed draft defence was prepared challenging the factual basis of many of these claims. The dispute, therefore, raised allegations of serious professional negligence and/or breach of contract in the performance of Drukkers' retainer. There were issues as to the nature and extent of Drukkers' duties and as to the correctness or adequacy of the advice which they gave. It seems to me to be highly likely that expert evidence would have been necessary to assist the court in the extent to which a competent receiver needed legal advice upon points which commonly arise during receiverships. The issues were factually complex, their resolution would require a detailed examination of the circumstances; witnesses would have to be called and an assessment made of their credibility in the light of the voluminous contemporary documentation. Statistics are no doubt a crude indication of the complexities of a case but they are not irrelevant: the papers run to 3000 pages, the material fills 11 lever arch files. No one has hazarded an estimate of the length of time that it would take to try such an action but even before a judge experienced in the field, it would surely take the best part of a week to try. It was, in short, likely to be a substantial action.

11. At the heart of this case lie these rival contentions; Ms Ayling, for the claimants, argues that these issues are suitable - and only suitable - for trial in the High Court; Mr Mallalieu, for the defendants, argues that they are suitable for trial before the costs judge. One only has to set the matter out in these terms to see the difficulties which Mr Mallalieu faces.

12. These then, in summary form, were the issues raised in the pre-action protocol. In fact, ***mediation*** did not take place - or if it did, it was not successful. More importantly, the defendants did not issue proceedings. Quite why they did not do so is unclear. Mr Mallalieu suggested that it may have been thought that the same points could be made more cheaply, more easily and more conveniently on an assessment before a costs judge. It was however plainly an informed and considered decision not to proceed by way of an action for negligence.

13. Once it was clear that the defendants did not intend to start proceedings, Mr Drukker applied to lift the stay on the assessment, which was done on 22nd December 2004. On the next day, 23rd December, he served a breakdown of his Bill of Costs. On 28th January 2005, the defendants served their Points of Dispute. It is an unusual document, for it did not so much take issue with the amount of the Bill, nor with the individual items claimed: it was more a frontal assault on the claimant's conduct of the retainer; the matters complained of went to fully 70% of the total amount of the bill. It set out, almost in the same terms as the draft particulars of claim, all the same allegations of negligence which they had previously made, raising again the issues under the same labels of `conduct', `assignment', `waiver' and `indemnity'.

14. So we come to the issues which were argued before Master Seager Berry.

15. The defendants argued that pursuant to section 70 of the Solicitors Act 1974, they had a statutory right to challenge the bill in the course of the assessment of costs. Reliance was also placed upon Part 44.3 (4) of the CPR which is in these terms: `*in deciding what order (if any) to make about costs, the court must have regard to all the circumstances including (a) the conduct of all the parties'*. It was suggested that the conduct there referred to gave the court the power - and indeed the duty - to consider all aspects of the solicitor's conduct and competence throughout the period of his retainer.

16. The claimants argued that, having made allegations of professional negligence in the pre-action protocols (thereby putting the claimants to very considerable cost in preparing the draft defence) and having then abandoned that process without issuing proceedings, it was an abuse of the process of the courts to resurrect precisely the same points in dispute by way of a defence to the claim for assessment of costs. Alternatively, it was said by the claimants that the Costs Judge should not countenance these claims being made in a costs assessment hearing; it was said that either he did not have jurisdiction to hear such a claim or, if he did, then he should refuse to do so on the grounds that the allegations are entirely unsuitable to be tried by a costs judge and were suitable only for trial in the High Court.

17. First we will deal with the argument that it is an abuse of process for the defendants to be permitted to raise by way of the Points of Dispute to the assessment precisely the same allegations which they made and did not pursue in a High Court action after the pre-action protocol procedure had run its course.

18. We were taken through a number of authorities, to which we should refer. The general principle is set out in the speech of Lord Diplock in **Hunter v Chief Constable o West Midlands Police** [1982] AC 529, 539; he said that the courts had an: *"inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."*

19. The classic statement of principle in so far as it applies to res judicata is the judgment of Sir James Wigram V-C in **Henderson v Henderson** (1843) 3 Hare 100, 115, where the judge said this: *" ...where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."*

20. So: it `*becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings'*, per Lord Kilbrandon giving the advice of the Privy Council in **Yat Tung Investment v Dao Hen Bank** [1975] AC 581 at 590. Further: `*the shutting out of a* ***`subject of litigation'*** *- a power which no court should exercise but after a scrupulous examination of all the circumstances - is limited to cases where reasonable diligence would have caused a matter to be raised earlier; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless* ***`special circumstances' are reserved in case justice should be found to require the non-application of the rule****'* (ibid).

21. The matter was examined in detail by Lord Bingham of Cornhill in **Johnson v Gore Wood** [2002] 2 AC 23, where (at page 31) he gave this helpful guidance: *"The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole ...... I would not accept that it is necessary before abuse may be found, to*

identify any additional element such as a collateral attack on previous decision or dishonesty but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceedings involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interest involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. ... it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the abuse is excused, or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interest of justice."

22. In **Aaron v Shelton** [2004] EWHC 1162 (QB), after a damaging document was produced, on the fifth day of the trial the claimant consented to the dismissal of the action, with indemnity costs. On the assessment the claimant sought to re-introduce elements of the claim which he had abandoned by discontinuing the action. Mr Justice Jack (at paragraph 20) said this: *`in my judgement, where a party wishes to raise a matter concerning the conduct of his opposing party (either before the litigation or during it), it is his duty to raise it before the judge making the costs order where it is appropriate to do so'.* Later at paragraph 21, he said this: *`the rationale is that it is an abuse of the process of the court's process to raise an issue before the costs judge which was not, but should have been, raised before the judge making the order for the payment of costs'.* Again, at paragraph 25, he set out this principle: *`On the particular facts, however, the position is even more plain. For, as I have set out, the issues which [the claimant] seeks to raise as to conduct were at the heart of his action. He consented to the dismissal of that claim. Just as it would be an abuse of the court's process to start a second action raising those issues, so it is an abuse to seek to raise them on an assessment of costs'.*

23. I was also referred to the decision of Neuberger J in **Rosling King v Rothschild Trust** [2002] EWHC 1346 (Ch), hearing a High Court action for the recovery of costs by solicitors, where the clients were too late to seek a statutory assessment under the Solicitors Act. There were in that case on-going proceedings and the only question was whether the proceedings should be heard by a High Court Judge or by a Costs Judge. The judge held, on the particular facts of that case, that allegations concerning the professional conduct of solicitors were more appropriately tried by a judge of the High Court. I do not think that the case lays down any general principles.

24. Of course, as Mr Mallalieu points out, in these cases the matters actually went to trial, whereas here there were only pre-action protocol pleadings, there were no proceedings and certainly no trial; the circumstances of these cases are, therefore, far removed from the factual position here. He argues that the courts should be cautious before shutting a party out from a legitimate form of redress. He quoted Lord Millett in **Johnson v Gore Wood** (op. cit. at page 59): *`it is one thing to refuse to allow a party to re-litigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not been adjudicated upon. This latter (although not the former) is a denial of the citizen's right of access to the court conferred by common law and guaranteed by article 6 of the [ECHR]'*

25. Ms Ayling argues that the defendants in this case had every opportunity for the matters to be fully considered in a High Court action following upon the pre-action protocol procedures, the defence of which cost Drukkers a good deal of money, which she concedes will not be recoverable under his Bill of Costs (at least not if Master Seager Berry's judgement is upheld).

26. Master Seager Berry delivered a long and thoughtful reserved judgement. After a lengthy review of the facts and the authorities, he gave his conclusion in these terms: *"I am of the clear view that the Claimant has been "**twice vexed in the same matter**". The Claimant has been put to wholly disproportionate and, at present, irrecoverable expense and trouble as a direct result of the Defendants invoking the pre action*

*protocol, details of which have been set out in this judgment. The Defendants has been threatening proceedings for negligence since 1999, a period of 6 years. There have been exchanges of pleadings and much else. The Defendants now seeks to raise "**exactly the same**" issues as has already been raised in these pleadings .... In my judgment there has been an abuse of the Court process because that Claimant is now being required to re-defend the allegations first levelled against him 6 years ago and which have been fully particularised in the draft pleadings. The Defendants has not had the courage of his convictions to bring proceedings in negligence. They may now be seeking to achieve a favourable result where the level of proof might be less rigid in the detailed assessment procedure than would apply in proceedings before a High Court Judge on pleadings where the evidence will be tested by cross examination. I therefore strike out the four categories which I have referred to in paragraph 8 in this judgment."*

27. In my judgement he was quite right to do so. It. was an abuse of the process of the court to seek to raise before the Costs Judge on an assessment of costs matters which could - and should - have been litigated before the court after the exchange of the pleadings in the pre-action protocol.

28. Even if I am are wrong on this point, it is, in my judgement, in the highest degree questionable whether a Costs Judge has the jurisdiction to hear claims of professional negligence of this wide ranging nature and extent. I was referred to the old case of In **re Massey and d Carey** (1884) Ch XXVI 461, where by a slip solicitors had failed to issue a rejoinder in time and the question arose whether issues of negligence could be raised upon taxation. Cotton LJ said this: *"In my opinion the question here is not the same as that which would arise in an action for negligence. The question here is whether the client should be charged with costs which are referable only to amending a slip made by the solicitor ...... that a certain step in the action would not have been necessary if the solicitor had done his duty in the ordinary way, and would hold that the costs of such a step were not properly chargeable to the client. No doubt in the case of **Matchett v. Parkes** (1) Baron Parke said, "**The Master had certainly no authority to entertain the question of negligence; that is a matter for the consideration of a jury." But any expression of a Judge must be taken with reference to the facts of the case before him, and in that case it was not a question of particular steps in the action, but the whole action had been rendered useless to the client by the negligence of his solicitor.**"*

29. Later, Bowen LJ said this: *"The Taxing Master when taxing a bill of costs relating to proceedings in a action is not bound to allow the costs of proceedings which are apparently unnecessary, and which could only be held to be proper if it were shewn that they were caused by the act of the client, not by the act of the solicitor ...... It is true that at common law the Taxing Master had not the power to decide the question of negligence in all cases. If the negligence gives to the loss of the whole action he cannot entertain the question; but if it relates only to certain proceedings in the action he can. Otherwise the unfortunate result would be that if there was a question as to the propriety of a particular step in the action, as to which no man is better able to decide than the Taxing Master, you place the client in the position that he would have to pay the charge and then bring an action to get it back from the solicitor. "*

30. Fry LJ put it this way: *"To my mind it is very clear that the Taxing Master has power to decide whether any particular items charged are proper, and to disallow them if they are improper. It is equally clear that no item can be proper which is due to the negligence or ignorance of the solicitor."*

31. Assessments are of course now heard by a Costs Judge. They are experts in costs. They do not try any other type of case. Of course, they do sometimes hear witnesses; they do sometimes hear and determine allegations of misconduct, but always within the context of the assessment of costs. The issues usually concern some discrete part of the bill. In our judgement - for I sit with assessors - the type of trial which would be required to resolve the issues in this case is entirely unsuitable by reason of its factual complexity and subject matter for trial by a costs judge.

32. Master Seager-Berry dealt with this argument as follows:
"58. In the present case, Ms Ayling has submitted, the issues are at the far end of the spectrum from the issue in Massey & Carey. At present there are significant issues of facts to be determined as is clear from the draft pleadings and from the sets of correspondence to which I have referred. The professional competence of the Claimant is in issue and Ms Ayling has been informed by their cost draughtsman that it goes to 70% of

the costs being claimed.As Ms Ayling has submitted, the issue of jurisdiction is fact sensitive. Here it concerns seventy percent of the claim.

60. Having carefully considered the issues of negligence raised in the draft pleadings and in the correspondence and the degree to which the Claimant has identified the percentage of cost which are in issue under these headings, I have reached the conclusion that if I am wrong on the issue of the abuse of process, that these issues should be resolved by a High Court Judge where there are formal pleadings and where the witness evidence can be tested by cross examination. I have already referred to the 11 files of papers considered by Counsel when settling the draft defence.

61. ... I have also reached the conclusion that detailed assessment is not the appropriate forum in which to determine the issues of alleged negligence raised by the Defendants."

.33. Before us Mr Mallalieu manfully sought to define the issues raised in the Points of Dispute into a series of short questions, to which he attached the now familiar labels to which I have already referred but - for the reasons I have already explored above - I do not think that these questions permit of simple answers; the issues are factually complex; witnesses must be called and cross-examined as to as to disputed facts; experts will be called; the allegations impute professional negligence; the papers are voluminous. Each of us is clearly of the opinion that these issues are not suitable for trial by Costs Judges. Such matters should be tried in the High Court.

34. Mr Mallalieu relies on a short passage at the end of the Master's earlier ex tempore judgement, when he said: `*the issues raised in this detailed assessment are capable of being determined by a Costs Judge, with the benefit of witness statements*'. The Master did not repeat that in his reasoned decision. It is quite clear from the passages which we have already quoted in paragraphs 60 and 61 that the Master came to the firm conclusion that these points were not suitable for trial on a costs assessment and were suitable only for trial in the High Court. With those conclusions we entirely agree.

35. Finally, the defendants argued that the decision of Master Seager Berry not to hear these allegations of negligence has deprived the defendants of their right to have these matters heard. I do not think that it does anything of the kind: for these defendants have always been entitled to commence a negligence action, and indeed they may still do so, if they are so advised. So there is nothing in this point; all that they are being prevented from doing is having these matters heard before a Costs Judge in the entirely unsuitable forum of the Supreme Court Costs Office. This is not the subject of a legitimate complaint.

36. I can therefore summarise my decision in these short propositions.

37. Each case should be approached on its own facts: in my judgment, in these circumstances, the Master did not have jurisdiction under section 70 of the Solicitors Act (or otherwise) to hear such wholesale allegations of professional negligence and such wide ranging criticisms of the solicitors conduct, which affected not just individual items in the bill of costs but which went to the heart of the retainer.

38. Even if he had jurisdiction, he was correct not to have exercised it, since it would be an abuse of the process of the court to allow the defendants to raise by way of the Points of Dispute to the Bill of Costs before the Master precisely the same allegations which they made in the pre-action protocol procedure, thereby putting the claimants to the very considerable costs of contesting the same, and which they did not pursue in a High Court action after the protocol had run its course.

39. The factual complexity of these matters made them entirely unsuitable for trial before a costs judge. The matter should be litigated, if at all, in the High Court.

40. The defendants are not without remedy; they had - and perhaps still have - a remedy by pursuing the matter by way of a professional negligence action in the High Court. (I should make clear that counsel did not canvass - or even mention - the possibility that the action may be statute barred, this matter therefore has played no part whatsoever in the conclusions which I have reached).

41. Accordingly I uphold the decision of Master Seager Berry for the reasons which he gave and the appeal is dismissed.

Judith Ayling (instructed by Nicholas Drukker & Co) for the Respondents
Roger Mallalieu (instructed by Squire & Co) for the Defendants

 Crown Copyright reserved.